

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 23-mc-80743-Middlebrooks-Matthewman

IN RE APPLICATION OF
ORTHOGEN INTERNATIONAL GmbH,

Petitioner,

For an order pursuant to 28 U.S.C. § 1782
to conduct discovery for us in a foreign proceeding(s)

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**MOTION TO INTERVENE OF DOUGLAS SCHOTTENSTEIN, M.D. AND
SCHOTTENSTEIN PAIN AND NEURO, PLLC D/B/A/ NY SPINE**

Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine

(“intervenor”) move to intervene in the above captioned proceeding. In support of their motion,

the intervenors show through their attorneys, The Law Offices of Cory H. Morris, Cory H.

Morris, P.C., an attorney duly admitted to practice in New York and Florida Courts:

1. I am attorney of record for Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine who are the potential (or actual) defendants in a German Proceedings that is/are the object of petitioner’s application in the instant case.

2. As stated in Petitioner’s Memorandum of Law in Support of the Ex Parte Application for an Order Pursuant to 28 U.S.C. § 1782 [D.E. 3] (hereinafter “Orthogen MOL”), Orthogen plans to file suit in Germany based on the underpayment of royalties from Edward Capla and Douglas Schottenstein, M.D. (Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine). See. D.E., P. 1.

3. Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine is the corporate entity through with Dr. Schottenstein operated his medical practice for the Regenokine license agreements entered into with Petitioner, Orthogen International GmbH (hereinafter “Orthogen”) that are discussed at

length in the Orthogen MOL in support of its Ex Parte Application for an Order pursuant to 28 U.S.C. § 1782 both here, in this case, and in Petitioner's 28 U.S.C. § 1782 action in New York.

4. On October 19, 2023, the undersigned as counsel for Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine received an electronic mail from counsel for Petitioner, Orthogen, which stated:

Good morning Cory,

Counsel for the Caplas and I have scheduled a meet and confer for 10:00 am this coming Monday. During the meet and confer, we plan to discuss the Caplas' document production in response to the subpoenas, as well as dates for the Caplas' depositions. Earlier this week, I reached out to Mr. Lumer to propose that his clients depositions be scheduled for November 2 and 3 and that he produce documents in response to the subpoenas by October 25, and asked him to confirm that the schedule worked so we could promptly inform you of the dates. Mr. Lumer emailed back indicating that the proposed dates would not work and he was not available to meet and confer this week, and so we scheduled the meet and confer for this coming Monday at 10:00 am. I have no objection to you being on the meet and confer call, but regardless, I intend to produce to you any documents that the Caplas produce in response to the subpoenas and to confirm that any deposition schedule we agree upon works for you.

Regards,
Chris

Id. (external quotation marks omitted)

5. Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine are Plaintiffs in the case of *Schottenstein et al v. Capla et al*, 22-cv-10883-PKC (S.D.N.Y.) wherein Edward Capla, Yolanda Capla and Orthogen are named Defendants.

6. Page two (2) of the Memorandum of Law in Support of Ex Parte Application for an Order Pursuant to 28 U.S.C. § 1782 in the present case states

Orthogen learned of the fraud when, in connection with a lawsuit that Dr. Schottenstein recently filed against it and Mr. Capla (among

others) in the U.S. District Court for the Southern District of New York (“SDNY Action”) arising out of the termination of Dr. Schottenstein’s license agreement with Orthogen, Dr. Schottenstein made sworn statements indicating that the number of Rogenokine patient treatments administered by NY Spine was far higher than Mr. Capla had reported. Specifically, in his verified complaint in the SDNY Action, Dr. Schottenstein stated that NY Spine treated thousands more patients than was reported to Orthogen and that he and Mr. Capla received millions of dollars more than would have been appropriate if the number of patient treatments reported to Orthogen was accurate.

Id. (external quotation marks omitted)

7. The factual assertions made in the Orthogen MOL are taken directly from the *Schottenstein et al v. Capla et al*, 22-cv-10883-PKC (S.D.N.Y.) allegations.

8. After the filing of *Schottenstein et al v. Capla et al*, 22-cv-10883-PKC (S.D.N.Y.), Orthogen filed an almost identical 28 U.S.C. § 1782 action against intervenors Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine and requests the same categories of documents as requested in the instant case and seeks deposition of Dr. Schottenstein. After Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine filed suit in *Schottenstein et al v. Capla et al*, 22-cv-10883-PKC (S.D.N.Y.), Orthogen filed another 28 U.S.C. § 1782 against intervenors in the Southern District of New York under *In Re: Orthogen International GmbH*, under case number 23-mc-00152-VSB.

9. Intervenors Dr. Schottenstein and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine filed an Order to Show Cause [D.E. 11] that is not yet resolved in the 28 U.S.C. § 1782 in the Southern District of New York, *In Re: Orthogen International GmbH*, under case number 23-mc-00152-VSB. The undersigned submits and incorporates an accompanying memorandum of law here and incorporates the arguments contained in these underlying New York proceedings.

10. Intervenor Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine have a direct, substantial and legally protectable interest in this matter as a co-defendant in an actual German Proceeding commenced against him as a defendant nevertheless the Contemplated German Proceeding described in the Memorandum of Law in Support of Ex Parte Application for an Order Pursuant to 28 U.S.C. § 1782 as any testimony given at a deposition ordered by the court could be used in the Contemplated German proceeding where he will, again, become a co-defendant.

11. No party to this case has the same ultimate objective as Intervenor Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine concerning any testimony given at a deposition ordered by the court which may ultimately be used against him in the Contemplated German Proceeding.

12. Intervenor exclusion from this proceeding would impair or impede his ability to protect his interest in the Contemplated German proceeding.

13. Intervenor Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine also have an interest in the pending motion seeking transfer (if not consolidation) of all cases mentioned into one action, the first action filed, in the Southern District of New York in the interest of judicial economy for the parties, for their counsel, for the production of documents and for the avoidance of duplicative proceedings and inconsistent rulings and results and preservation of judicial resources.

14. Intervention in this action will not unduly delay the proceedings or prejudice the adjudication of the original parties' rights. Intervenor enter to avoid duplicative discovery and promote preservation of party, lawyer and, most importantly, judicial time and resources in what may become inconsistent legal or factual findings without a stay and/or transfer of this matter.

15. I hereby certify that I conferred with counsel for all parties and, while they may object to stay, transfer or consolidation of these proceedings, they do not object to this motion for Douglas Schottenstein, M.D. and Schottenstein Pain and Neuro, PLLC d/b/a/ NY Spine to intervene/participate herein.

DATED AT: Central Islip, NY
November 13, 2023

/s/ Cory H. Morris /s/

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